U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

DATE: JULY 16, 1998

CASE NO.: 96-INA-439

In the Matter of:

ROLA KIMMERLING ASSOCIATES, INC.,
Employer,

on behalf of

CYNTHIA M. MEJIA,
Alien.

Appearance: Sandra G. Levitt, Esq.

Before: Lawson, Neusner and Vittone
Administrative Law Judges

JAMES W. LAWSON
Administrative Law Judge

DECISION AND ORDER

This case arises from Rola Kimmerling Associates' ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification on behalf of Cynthia M. Mejia ("Alien").[1]

This decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

[1] The certification of aliens for permanent employment is governed by §212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20 Part 656 of the Code of Federal Regulations. Unless otherwise noted, all regulations cited to in this decision are in Title 20.

STATEMENT OF THE CASE

On January 18, 1995, the Employer, Rola Kimmerling Associates, Inc., filed an application for labor certification to enable the Alien, Cynthia M. Mejia, to fill the position of "Art Director." (AF 5). The requirements of the position were a Bachelor's degree in Fine Art, Graphic Design, two years of experience and fluency in Spanish. The duties were described as follows:

> Determines the promotional and advertising needs of clients in accordance with their goals and objectives; responsible for all technology coordination including developing design concepts, preparing layout compositions and mechanicals; reviewing and overseeing final layouts for production and supervising digital input and output of projects; estimating budgets for design and production; and preparing budget reports. Responsible for developing Hispanic Division of the company including research, product development and client contact. Utilize computer hardware and software including illustrator, Photoshop, QuarkXpress (layout program). Supervise three Assistant Art Directors/Graphic Designers.

(AF 5). The salary offered was $72,000.00 per year.

On May 17, 1995, the Department of Labor of the State of New York had questioned the foreign language requirement, as well as Employer's initial classification of the position as a graphic designer, finding the job to be more in line with that of an art director. (AF 55). By letter dated June 29, 1995, Employer had submitted justification for the language requirement, and agreed to amend the title of the position to Creative Director, also amending the salary to $60,000.00. (AF 50).[2]

On July 7, 1995, the Department of Labor of the State of New York questioned the prevailing wage, noting that the salary for a Creative Director in the New York metropolitan area was $149,517.00 per year. By letter dated August 17, 1995, Employer responded that the salary had been amended to reflect an annual salary of $72,000.00 per year, and that the job title had been changed to reflect that the position was that of an Art Director.

In a Notice of Findings (NOF) dated February 9, 1996, the CO proposed to deny certification because the wage offered did not equal or exceed the prevailing rate. Specifically, the CO noted that the job duties, including the responsibility for developing the Hispanic Division of the company, was more in line with a "Creative Director" position, than an "Art Director." The prevailing wage for the former position within the New York metropolitan area, was $149,517.00 per year, as determined by the New York State Department of Labor, and based upon the Research & Statistics Survey for the Advertising and Publishing Industry. Employer was advised it could rebut this finding by increasing the salary offer or by submitting evidence that the

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[2]Employer had originally listed the position as that of "Graphic Designer" with a salary of $35,000.00 per year. (AF 52).

prevailing wage determination was in error, and that Employer's wage offer did equal or exceed the correct prevailing wage. Employer was reminded that when faced with conflicting job duties, the Prevailing Wage Unit at the State Office must use the occupational code and corresponding prevailing wage, for the highest paying job in the combination.

Counsel for Employer submitted rebuttal on March 14, 1996. (AF 106). Therein, counsel argued that the position at issue was that of an "Art Director," not a "Creative Director," and that even if the position was that of a "Creative Director," the wage offered exceeded the prevailing wage for such a position. With regard to the job title, Employer contended that the correct title was Art Director, in accordance with the Dictionary of Occupational Titles (DOT), since the position involved promotional work, preparation and supervision of layouts, preparation of budgets, computer work and supervision of assistant workers. The position of Creative Director, by contrast, involved conferring with heads of art, copy writing, and production departments to discuss client requirements and scheduling, which duties were not involved herein.

Employer pointed to a prior labor certification case involving a Creative Director in a graphic design company, wherein the prevailing wage was determined to be $55,000.00 per year in the New York metropolitan area. Employer also stated that there was a difference between advertising positions and graphic design positions, and that the survey utilized by the State Department of Labor would not normally be used for the graphic design industry. Employer argued that it was a small business, and therefore, should not be included in the same category as big companies who are expected, and can afford, to pay higher wages.

On March 27, 1996, the Employer's evidence regarding a prevailing wage was submitted to the Prevailing Wage Specialist for review. (AF 113). That evidence consisted of (1) The American Institute of Graphic Arts Salary and Benefits Survey - 1994 (AIGA survey); (2) The Graphic Artists Guild Handbook: Pricing and Ethical Guidelines (GAGH survey); (3) The American Association of Advertising Agencies Survey (AAAA survey); and (4) the 1994-1995 Printing Professional Compensation Study (PPCS study).

By report dated April 24, 1996, the Prevailing Wage Specialist (PWS) stated that he had reviewed the four wage sources submitted by Employer. (AF 127). The AIGA was found to be deficient because the survey area comprised New York State, New Jersey and Pennsylvania, an unnecessary expansion of the area of intended employment. The PWS found that the average base salary shown was not defined and may not have been computed in accordance with 20 C.F.R. §656.40(a). The survey also did not provide entry and experienced level wage rates, nor did the Employer provide the job descriptions, if any, used in the survey.

The PWS found the GAGH survey to be deficient because it did not give the weighted average as defined by 20 C.F.R. §656.40(a), and the salary data shown by occupation was restricted to ranges for small and large firms, the terms "small" and "large" not being defined in the study. The survey area was not defined for the occupations of Creative Director and Art/Design Director. Entry and experience wage rates by occupation were not given, job descriptions, if used, were not provided and the number of firms and workers surveyed in each

occupation was not shown.

The AAAA survey did not provide a weighted average of all salaries reported by occupation, and did not provide a mean based on all workers. The survey area was not defined, job descriptions, if used, were not given, and the survey did not provide separate wage rates for entry and experience level workers. The PPCS survey gave no wage information for a Creative Director. The survey used the term "Average Salary Reported" (ASR), which was not defined in the survey, and the ASR given for an Art Director was based on only one response in New York State. Separate wage rates for entry level and experienced level workers were not given, nor were job descriptions provided.

The PWS concluded that the State Employment Service Agency (SESA) survey, published in April of 1995, was calculated in accordance with 20 C.F.R. §656.40(a), and the area surveyed was appropriate. Advertising agencies, and firms in the book, newspaper, magazine and periodical publishing and printing industries were surveyed. According to the PWS, a total of 49 establishments reported salaries for 66 Creative Directors, one prevailing wage being calculated based on the 66 salaries reported.

A Final Determination was issued on May 2, 1996. (AF 132). Therein, the CO, relying upon the PWS's report, determined that the surveys submitted by Employer were deficient, and that the SESA study warranted more weight. Accordingly, labor certification was denied.

Employer wrote requesting an extension of time in which to request a review of the denial of certification on May 30, 1996. (AF 139). There is a notation on the letter that Employer's counsel was telephoned, and she indicated that the letter was a request for an appeal, and that a brief would follow. On July 2, 1996, Employer wrote the CO requesting that she reconsider the prevailing wage issue, while on July 3, 1996, counsel for Employer wrote requesting a review of the denial of labor certification. (AF 170, 184). With the request for review, counsel for Employer enclosed letters from six owners of Direct Response Advertising, which is Employer's area of business; explained in greater detail the surveys previously submitted by Employer, and submitted, once again, the copy of the approved labor certification application for a Creative Director wherein the prevailing wage of $57,500.00 was determined in 1995. Employer and its counsel stress that Direct Response Advertising is different from General or Image Advertising.

DISCUSSION

20 C.F.R. §656.40(a)(2)(i) provides that if the job opportunity is in an occupation which is not covered by a prevailing wage determined under the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act, the prevailing wage for labor certification purposes shall be:

> The average rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wage paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers. Since it is not always feasible to determine such an average rate of wages with

> exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages. . .

For purposes of this section, "similarly employed" means "having substantially comparable jobs in the occupational category in the area of intended employment."

In the instant case, the Employer attempted to establish a prevailing wage, also questioning, from the beginning, the fact that another labor certification, entailing the position of a Creative Director in New York, had a prevailing wage of $55,000.00. The CO did not respond to that issue, nor did the CO give Employer the opportunity to respond to either the wage survey conducted by SESA or the analysis of Employer's surveys by the PWS. As a result, a remand appears to be appropriate.

Thus, in Rhythm & Hues, Inc., 93-INA-563 (Dec. 9, 1994), where Employer showed that the position did not require the extensive executive or supervisory qualifications contemplated by the wage survey relied on by the CO, but the Employer's alternate surveys were either irrelevant or inaccurate, the case was remanded to the CO with instructions that the CO reevaluate the prevailing wage determination based upon a survey of workers similarly employed. In Carlos & Annie's, 93-INA-11 (March 18, 1994), the case was remanded where the employer questioned why (1) the CO's wage survey required a different wage than was required in another certification of what seemed a similar job in the same area of employment; and (2) the CO's wage survey may have included the entire State rather than the MSA in which the job was located. Because the CO did not respond, the case was remanded to allow the CO to respond and Employer to either raise its wage rate or again challenge the CO's determination.

In the instant case, a second NOF would have been appropriate to provide Employer an opportunity to review and respond to the SESA survey relied upon by the CO, as well as to allow Employer the opportunity to more fully explain its surveys, or submit the additional surveys it has filed with the appeal. Additionally, the CO should have responded to the issue of the prior labor certification case for the position of Creative Director, wherein the wage of $57,500.00 was found to be acceptable. It is appropriate, therefore, in light of these deficiencies in the determination reached by the CO, to remand this matter for further consideration by the CO. At that time, the CO should address the issue raised by the Employer regarding the difference between Creative Director positions in Direct Response Advertising Agencies and that position in General or Image Advertising. See Lisa Renstrom, 93-INA-262 (June 28, 1994). The CO should also explain the discrepancy between the wage of $57,500.00 for a Creative Director, as accepted in the prior case cited by Employer, and the instant case wherein the prevailing wage was set at $149,517.00.

ORDER

The Certifying Officer's denial of labor certification is ***VACATED*** and the case is ***REMANDED*** for proceedings consistent with this opinion.

For the Panel:

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James W. Lawson
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C. 20001-8002

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.